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Supreme Court of the United States

October Term, 1969

No. 563

THE HOUSE OF SEAGRAM, INC.,

Appellant,

against

STATE LIQUOR AUTHORITY and ARTHUR LEVITT, Comptroller of the State of New York,

Appellees.

On Appeal from the Court of Appeals of the State of New York.

MOTION TO DISMISS APPEAL

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TABLE OF CONTENTS

PAGE

quate non-federal basis; or, in the alternative, the decision of the Court of Appeals of New York should be affirmed 15

Appendix A—Text of Constitutional and Statutory provisions 16

United States Constitution

Art. I, § 8, cl. 3 16

Art. I, § 10, cl. 2 16

Amendment XXI, § 2 16

Wilson Act, 27 U. S. C. § 121 16

Webb-Kenyon Act, 27 U. S. C. § 122 17

New York Alcoholic Beverage Control Law

§ 3 18

§ 99-a 18

§ 101-bb 23

New York Tax Law § 432 25

Rules of [New York] State Liquor Authority, Rule 16 25

Appendix B—Court of Appeals Opinion 26

Appendix C—Opinion of Supreme Court, Appellate Division 27

Appendix D—Opinion of Judge Foster 34

Table of Cases.

Agricultural Bank v. Tax Commission, 392 U. S. 339 (1968) 14

Anglo-Chilean Corp. v. Alabama, 288 U. S. 218 (1932) .. 6

Brown v. Maryland, 12 Wheat. (25 U. S.) 419 (1827) 4, 5, 10

Canton R. Co. v. Rogan, 340 U. S. 511 (1951) 11, 12

DeBary v. Louisiana, 227 U. S. 108 (1913) 7, 8, 10

Department of Revenue v. James Beam Co., 377 U. S. 341 (1964) 4, 5, 9, 10

PAGE

Educational Films Corporation v. Ward, 282 U. S. 379 (1931) 11, 12
Finch & Co. v. McKittrick, 305 U. S. 395 (1939) 8
Gordon v. Texas, 310 S. W. 2d 328 (1956), affd. 355 U. S. 369 (1958) 9, 10, 13
Henneford v. Silas Mason Corp., 300 U. S. 577 (1936) .. 13
Hostetter v. Idlewild Liquor Corporation, 377 U. S. 324 (1964) 8, 9
In re Rahrer, 140 U. S. 545 (1891) 7
Indianapolis Brewing Co. v. Liquor Control Commission, 305 U. S. 391 (1939) 8
Leisy v. Hardin, 135 U. S. 100 (1898) 6
Mahoney v. Triner Corp., 304 U. S. 401 (1939) 8
Peck & Co. v. Lowe, 247 U. S. 165 (1918) 11, 12
Phillips v. Mobile, 208 U. S. 472 (1908) 7
Pierce Oil Corp. v. Hopkins, 264 U. S. 137 (1924) 14
Rhodes v. Iowa, 170 U. S. 412 (1898) 7
Scripto v. Carson, 362 U. S. 207 (1960) 14
Seagram & Sons v. Hostetter, 384 U. S. 35 (1966) 8
State Board of Equalization v. Young's Market Company, 299 U. S. 59 (1936) 8
Waring v. Mobile, 8 Wall. (75 U. S.) 110 (1868) 13

CONSTITUTIONAL AND STATUTORY PROVISIONS.

New York Alcoholic Beverage Control Law
§ 3 ..... 12, 18
§ 99-a 1, 2, 3, 12, 13, 18
§ 101-bb 14, 23
New York Tax Law § 432 ..... 13, 25
Rules of the [New York] State Liquor Authority, Rule 16 ..... 13, 25
United States Constitution
Art. I, § 8, cl. 3 (Commerce Clause) 16
Art. I, § 10, cl. 2 (Import-export Clause) 1, 2, 4, 16
Amendment XXI, § 2 ..... 8, 16
Webb-Kenyon Act, 27 U. S. C. A. § 122 ..... 8, 9, 17
Wilson Act, 27 U. S. C. A. § 121 ..... 6, 7, 8, 9, 16

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THE HOUSE OF SEAGRAM, INC.,
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against

STATE LIQUOR AUTHORITY and ARTHUR LEVITT,
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Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

Appellees move to dismiss appellant's appeal upon the grounds: (a) that there is not present any substantial federal question, (b) that the judgment rests on an adequate non-federal basis.

Question Involved

Are the fees imposed by New York Alcoholic Beverage Control Law § 99-a,[1] for the exercise of the privilege granted by a brand label use permit, a tax on imports within the meaning of the import-export clause of the United States

[1] The text of relevant statutory and constitutional provisions are set forth in Appendix A.

Constitution (Art. I, § 10, cl. 2)? The New York Supreme Court, the Appellate Division of the New York Supreme Court, and the New York Court of Appeals, New York's highest Court, have unanimously held that the brand label use permit fee is not a tax on imports.

Statement of the Case

Appellant, a Delaware corporation licensed by the State of New York to sell liquor at wholesale within the State, challenges the validity and seeks return of the brand label use permit fee imposed by New York Alcoholic Beverage Control Law[2] Section 99-a[3] insofar as the fee applied to liquor, sparkling wine and beer which were imported from foreign countries and which were sold within the State in the original package of importation for resale and/or ultimate consumption within the State.

Appellant contends that the brand label use permit fee is a tax on imports within the meaning of Art. I, § 10, cl. 2 of the United States Constitution.

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[2] The New York Alcoholic Beverage Control Law regulates the manufacture, sale and distribution of alcoholic beverages within the State of New York. Those trafficking in alcoholic beverages in the State are required to be licensed in accordance with the provisions of this law.

[3] Added, L. 1963, c. 204, effective April 1, 1963; repealed by L. 1968, c. 597, effective September 1, 1968. The repealing statute contained an express saving clause, § 4(c), as to fees accrued while it was in effect. It provides:

> "(c) All provisions of section ninety-nine-a of the alcoholic beverage control law in respect to the payment, determination, collection and refund of brand label use permit fees, and the filing of returns and preservation of records for the purposes of such fees, shall continue in effect with respect to all fees accrued up to the effective date of this act."

The Brand Label Use Permit Fee

The brand label use permit fee which is the subject of this proceeding was in effect in the State of New York from 1963 to 1968. Alcoholic Beverage Control Law Section 99-a then required that a manufacturer or wholesaler secure a brand label use permit as a condition precedent to the sale in the State of New York of liquor, sparkling wine or beer[4] under a brand label or trade name.

The brand label use permit conferred on the permittee the exclusive privilege of selling that brand in the State of New York. Section 99-a imposed on the brand label permittee a fee payable monthly and measured by the volume of liquor of his brand label sold in the State during the previous month.

We emphasize two salient aspects of the brand label use permit fee:

(1) the brand label use permit fee was imposed on all liquor sold in the State under a brand label regardless of whether the liquor was manufactured in the State, shipped into the State from other states, or imported from a foreign country;

(2) the fee was applicable only after the merchandise had been sold in the State for resale and/or ultimate consumption in the State.

Section 99-a placed liability for payment of the gallonage fee on the brand label use permittee but provided for rebutting the presumption of such liability by showing that another wholesaler or manufacturer had paid the fee or had assumed or was liable for payment of the fee.

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[4] Since there is no controversy as to the fact that liquor, sparkling wine and beer are the beverages subject to the brand label use permit fee, for convenience the word liquor will be used herein to include the three classes of beverages involved.

Decisions of the New York Courts

The constitutionality of the brand label use permit fee as applied to imported liquor sold in the original package of importation was upheld (a) by the New York Supreme Court (at Special Term, Albany County, the Court of original jurisdiction), (b) unanimously by the Appellate Division of the New York Supreme Court, and (c) unanimously by the New York Court of Appeals. The opinions are reported as follows:

Supreme Court, Special Term (Appendix D hereto) 51 New York Misc. 2d 157, 272 N. Y. S. 2d 839, June 2, 1966;

Appellate Division (Appendix C hereto) 30 New York A. D. 2d 380, 292 N. Y. S. 2d 183, July 22, 1968;

Court of Appeals (Appendix B hereto) 25 N. Y. 2d 865, July 2, 1969.

POINT I

The case presents no substantial federal question. As the New York Courts have held, the brand label use permit fee is not a tax on imports within meaning of Article 1, § 10, Cl. 2 of the Constitution of the United States, but rather the fee is a tax on the privilege of selling a particular brand of liquor within the State of New York after it has been imported.

Appellant predicates its jurisdictional statement on the hypothesis that the brand label use permit fee is a tax on imports and hence that the decision of the Court of Appeals in the instant case conflicts with decisions of this Court in *Brown* v. *Maryland*, 12 Wheat. (25 U. S.) 419 (1827), and *Department of Revenue* v. *James Beam Co.*,

377 U. S. 341 (1964). We shall demonstrate that there is no substantial federal question involved in this appeal, by developing briefly (a) the factual differences between those cases and the instant case and (b) judicial precedents in this Court which lead inescapably to the conclusion that the brand label use permit fee is not a tax on imports but rather is a valid privilege tax within the State's power to regulate and tax the distribution of liquor *within its borders.*

A. The brand label permit fee is payable after the liquor has come to rest in the State of New York.

Brown* v. *Maryland

In *Brown* v. *Maryland, supra*, this Court proscribed a license charge levied by the State of Maryland against importers selling at wholesale. The opinion of this Court emphasized (a) that Courts should not carry the import-export clause beyond the constitutional purpose *i.e.* protecting inland states from taxation by coastal states (p. 441); (b) that it was not stating "any rule as being universal in its application" to the question of when the import process was terminated and when the State's taxing power began (pp. 441-442); (c) that the power of Congress to authorize importation implied the power to authorized sale (pp. 446-447); (d) that the principles set forth in the original package doctrine applied equally to imports from a sister state (p. 449). This Court stated (p. 449):

> "We do not mean to give any opinion on a tax discriminating between foreign and domestic articles."

Thus, although the *Brown* opinion makes clear that this Court was seeking to enforce the prohibition against the exploitation of inland states by coastal states, it developed the original package doctrine in terms of Congressional

power under the commerce clause of the Constitution of the United States.

The relevance of the commerce clause to the original package doctrine was recognized by this Court in *Anglo-Chilean Corp.* v. *Alabama*, 288 U. S. 218 (1932), in which this Court wrote (p. 226):

> "In that case [*Brown* v. *Maryland*] a state license fee imposed on an importer selling imported goods in the original bales or packages was condemned as repugnant to the imports and *commerce clauses*." (Emphasis added.)

The Wilson Act

In 1889 in *Leisy* v. *Hardin*, 135 U. S. 100, this Court held that an Iowa statute prohibiting the sale of intoxicating liquors (except for medicinal, chemical or sacramental purposes and under a state license) was unconstitutional as to liquor sold in the original package of importation. Again this Court did not distinguish between liquor which came from a sister state and liquor which came from another country.

To overcome the effect of *Leisy* v. *Hardin*, Congress in 1890 passed the so-called Wilson Act or Original Package Act, 27 U. S. C. A. §121, the full title of which is "An Act to eliminate the effect of the regulations of commerce between the several States and with foreign countries in certain cases." The Wilson Act provides:

> "§ 121. State statutes as operative on termination of transportation; original packages. All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or

> Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." (Aug. 8, 1890, c. 728, 26 Stat. 313.)

This Court interpreted the Wilson Act as divesting liquor of its character as an import and subjecting it to State law *on its arrival at its destination within the State. In re Rahrer*, 140 U. S. 545 (1891); *Rhodes v. Iowa*, 170 U. S. 412 (1898).

In *Phillips* v. *Mobile*, 208 U. S. 472 (1908), this Court held that under the Wilson Act the State's power with respect to liquor in original packages included the power to tax. In that case this Court sustained a city license fee on persons selling beer by the barrel even though the license was a revenue measure and beer originating outside the State was sold in the original package.

Five years later, in *DeBary* v. *Louisiana*, 227 U. S. 108 (1913), this Court emphasized that under the Wilson Act a State had the same power to tax liquor brought in from a foreign country as it had any other liquor. In *DeBary* this Court sustained a Louisiana license tax on a business which consisted solely of the sale in the original packages of foreign wine or liquor. This Court was specific in its statement that the powers of a State with respect to regulation and taxation of liquor were the same irrespective of whether the liquor came from one state to another or was imported from foreign countries. The *DeBary* case alone is conclusive authority for the proposition that the brand label use permit fee is constitutional applied to liquors from foreign countries sold in the original package.

Appellant seeks to avoid the effect of *DeBary* by its statement (Jurisdictional Statement, p. 14):

> "Since *Brown* v. *Maryland*, the import-export clause has been assumed to apply only to wholesale sales never to retail or consumer sales."

Without any authority for this position appellant seeks to establish an arbitrary distinction. Appellees submit that the true criterion is not whether the sale is wholesale or retail, but whether the liquor is destined for distribution or use within the taxing state, and that liquor which is still in transit to a state other than the taxing state comes clearly within the prohibition of the import-export clause. This distinction will be fully developed *infra*.

The Twenty-first Amendment

The passage of the Twenty-first Amendment to the United States Constitution has given constitutional expression to the doctrine that a State has complete power over the transportation and distribution of liquor within its borders. Since the adoption of the Twenty-first Amendment, this Court has frequently repeated that a State is unconfined by traditional commerce clause limitations in respect to regulation of the use, distribution or consumption of alcoholic beverages within the State. *Seagram & Sons* v. *Hostetter*, 384 U. S. 35 (1966); *Hostetter* v. *Idlewild Liquor Corp.*, 377 U. S. 324 (1964); *Indianapolis Brewing Co.* v. *Liquor Control Commission*, 305 U. S. 391 (1939); *Finch & Co.* v. *McKittrick*, 305 U. S. 395 (1939); *Mahoney* v. *Triner Corp.*, 304 U. S. 401 (1939); *State Board* v. *Young's Market Co.*, 299 U. S. 59 (1936).

The Twenty-first Amendment did not in any way affect the operation of the Wilson Act or the Webb-Kenyon Act.[5]

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[5] Shortly after the *De Bary* decision (*supra*), Congress in March, 1913 enacted the Webb-Kenyon Act (27 U. S. C. A. § 122) which

(Footnote continued on following page)

Both are still in effect. *Hostetter* v. *Idlewild Liquor Corp., supra,* see note 11, 377 U. S. 333; *Dept. of Revenue* v. *James Beam Co., supra,* see note 7, 377 U. S. 345.

Gordon* v. *Texas

In *Gordon* v. *Texas,* 310 S. W. 2d 328 (1956), affd. 355 U. S. 369 (1958), the Court of Criminal Appeals of Texas and this Court affirmed a conviction for illegal possession of eleven bottles of rum which had been imported from Mexico to Texas without a permit and to which the required Texas stamps had not been affixed. The defendant had imported the liquor for his personal use, and he planned to take it to his home in North Carolina. In that case the State tax was upheld as not a tax on imports. The key to the *Gordon* case appears in the opinion of the Court of Criminal Appeals of Texas in which the Texas Court wrote at 310 S. W. 2d 330:

> "In fact the instant tax could not become an import tax because *the importation must have been completed before the tax here levied attached.*" (Emphasis added.)

Dept. of Revenue* v. *James Beam Co.

Dept. of Revenue v. *James Beam Co.,* 377 U. S. 341, *supra,* which appellant regards as the mainstay of its case,

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(Footnote continued from preceding page)

was reenacted without change in August, 1935. The Webb-Kenyon Act provides that the shipment or transportation of intoxicating liquor into a state, territory or district of the United States to be received, sold or used, whether in the original package or otherwise, in violation of the laws of such state, territory or district, is prohibited. Whereas the Wilson Act gave the States power with respect to liquor after its arrival in the State, the Webb-Kenyon Act went further and subjected to all the laws of the state not only the use of liquor in the State but also the transportation of liquor into its territory.

dealt with a Kentucky statute which required a permit to ship liquor into the State and levied a tax on each shipment. This Court found that tax to be a tax on imports with reference to shipments of Scotch whisky shipped from Scotland via Chicago or New Orleans to bonded warehouses in Kentucky. The opinion notes:

> "It is subsequently sold by the respondent to customers in domestic markets throughout the United States."

Beam then deals with a tax on shipment into Kentucky of liquor destined for distribution in other states. This is clearly within the purpose of the constitutional prohibition of a tax on imports.

Thus *Brown* v. *Maryland, supra,* which relied on the commerce power as well as the import clause in dealing with a tax on importers who sold at wholesale,[6] and *Beam,* which dealt with liquor to be sold throughout the United States, are not apposite to a brand label use permit fee which applies alike to liquor originating in the State, in other states and in foreign countries after the liquor has been sold for resale and/or consumption in the taxing State.

Controlling in the instant case, therefore, are *Gordon* v. *Texas, supra,* and *De Bary* v. *Louisiana, supra,* which show that a brand label use permit fee on liquor which is to be resold and/or used in New York comes within the State's taxing power. As this Court stated in *Beam* (p. 346):

> "There can surely be no doubt, either, of Kentucky's plenary power to regulate and control, *by taxation or*

[6] Appellant's Jurisdictional Statement (p. 9) implies that the statutory section challenged in *Brown* v. *Maryland* applied only to "local" sales whereas in fact the section referred to "wholesale" sales (p. 436).

otherwise, the distribution, use, or consumption of intoxicants within her territory *after they have been imported.*" (Emphasis added.)

B. The brand label use permit fee is a valid privilege tax.

It is well settled that a state may enact a privilege tax or other form of excise tax although the statutory measure of the tax involves property constitutionally immune from any form of direct taxation. In *Educational Films Corp.* v. *Ward,* 282 U. S. 379 (1931), this Court sustained a New York tax on certain classes of domestic corporations "for the privilege of exercising its franchise in this State" even though the tax included income from federal copyrights which are otherwise immune from state taxation as instrumentalities of the Federal Government. *Peck & Co.* v. *Lowe,* 247 U. S. 165 (1918), cited in the *Educational Films* case, sustained an income tax which applied, in that case, on the income of a business the major part of which was derived from exporting.

In *Canton R. Co.* v. *Rogan,* 340 U. S. 511 (1951), this Court upheld a Maryland franchise tax on railroads, measured by gross receipts even though all revenues derived by the appellant resulted from its handling of goods moving in foreign trade. There this Court made a sharp distinction between a tax on the goods and a tax on handling them at the port.

The analogy to the instant case is significant. The alcoholic beverages involved in the instant case were sold by appellant for resale and consumption within the State. The brand label fee is imposed for the privilege of using the brand name; it is not imposed on the liquor as such. Measurement of the privilege fee by the volume of alcoholic beverage concerned is clearly valid under the holdings

in the *Educational Films* case, *Peck & Co.* v. *Lowe*, and *Canton R. Co.* v. *Rogan*.

The authorities cited *supra* lead inescapably to the conclusion that the import process with respect to liquor terminates when the liquor arrives in the State for sale and consumption therein and that under the Wilson Act and the Twenty-first Amendment legal precedents dealing with commodities other than liquor have no pertinence to the termination of the import process with respect to liquor.

The authorities cited, *supra*, also establish that the brand label use permit fee prescribed by Alcoholic Beverage Law § 99-a is a valid tax on the privilege of selling the permittee's brand of liquor within the State of New York. The instant appeal, therefore, presents no substantial federal question

POINT II

The judgment rests on an adequate non-federal basis.

A. Under [New York] Alcoholic Beverage Control Law § 99-a, if the brand label use permit fee were not payable on the first sale, it still is payable by reason of the subsequent sale.

Alcoholic Beverage Control Law § 99-a(3)(a) imposes upon the brand label use permittee the duty to pay a fee based upon the volume of alcoholic beverages "sold in the state." Alcoholic Beverage Control Law § 3 defines "sale" to mean "any transfer, exchange or barter in any manner or by any means whatsoever for a consideration * * *." The terms "wholesale sale" and "retail sale" are defined in the same section to mean a sale for resale and a sale to a consumer respectively. There is no reason to exclude from the scope of the terms "sale" or "sold," as used in § 99-a, either the retail sale or the wholesale sale.

There is, of course, no contention by either party that these fees are payable twice on the same quantity of beverage since that is specifically prohibited by [New York] Tax Law § 432, which is made applicable to these fees by [New York] Alcoholic Beverage Control Law § 99-a(3)(d). The duty to pay these fees thus falls on appellent at *either* of two times; when he sells the beverages *or* when his vendee sells them.

There can be no doubt that a tax on the second sale, after the merchandise has left the hands of the person who imported them, is not prohibited by the Federal Constitution. *Waring* v. *Mobile*, 8 Wall. (75 U. S.) 110 (1868). There is also no doubt that when by reason of exemption or immunity a tax is not paid by the wholesaler who would otherwise be required to pay it, the State may impose a "compensating" tax on subsequent sale or use of merchandise. *Henneford* v. *Silas Mason Corp.*, 300 U. S. 577 (1936); *Gordon* v. *Texas*, 310 S. W. 2d 328, aff'd 335 U. S. 369, *supra*.

Since the brand label use permit fee would apply on the second sale if not payable by reason of the first sale, the result reached by the Court of Appeals is sustained on a non-federal basis.

B. Since State law requires that the brand label use permit fee be paid by all subsequent vendees, it is really a tax on the ultimate buyer collected by the original vendor.

Appellant, as a wholesaler licensed under the Alcoholic Beverage Control Law, must operate its business in strict compliance with the Alcoholic Beverage Control Law and the rules and regulations promulgated thereunder. The regulations of the State Liquor Authority provide [Rules of State Liquor Authority, Rule 16; 9 NYCRR 65.4(a)]:

> "The price to retailers * * * shall include * * * State taxes and fees * * *"

Thus appellant, in effect, does nothing more than collect the brand label use permit fees from its vendees and remits them to the State.

The retailer passes these fees on to the consumer by virtue of Alcoholic Beverage Control Law § 101-bb which prevents him from selling below cost, which is defined to include these fees.

The brand label use permit fee, therefore, is in reality a tax on the ultimate consumer which is collected by the permittee. This Court has held that a State may impose upon a vendor the duty of collecting such a tax, *i.e.*, a tax which is imposed upon someone else. *Scripto* v. *Carson*, 362 U. S. 207 (1960); *Pierce Oil Corp.* v. *Hopkins*, 264 U. S. 137 (1924).

In evaluating a state's power to tax national banks, this Court held the actual incidence of the tax to be a controlling criterion. In *Agricultural Bank* v. *Tax Commission*, 392 U. S. 339 (1968), this Court wrote (p. 347):

> "And essentially the question for us is, On whom does the incidence of the tax fall? * * *
>
> "It would appear to be indisputable that a sales tax which by its terms must be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser."

Applying the *Agricultural Bank* doctrine to the instant case, the legal incidence of the brand label use permit fee is on the ultimate purchaser, and hence the result of the Court of Appeals decision rests on an adequate alternate non-federal basis.

CONCLUSION

The appeal should be dismissed upon the grounds (a) that it does not present any substantial federal question warranting this Court taking jurisdiction, (b) that the judgment rests on an adequate non-federal basis; or, in the alternative, the decision of the Court of Appeals of New York should be affirmed.

Dated: September 25, 1969.

Respectfully submitted,

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APPENDIX A

Constitutional and Statutory Provisions

UNITED STATES CONSTITUTION

Art. I, § 8, cl. 3

[The Congress shall have Power.]

To regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes;

Art. I, § 10, cl. 2

No State shall, without the Consent of the Congress, lay any Imposts or Duties or Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports and Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

Amendment XXI, § 2

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

WILSON ACT OR ORIGINAL PACKAGES ACT
27 U. S. C. A. § 121

§ 121. State statutes as operative on termination of transportation; original packages. All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consump-

tion, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise. (Aug. 8, 1890, c. 728, 26 Stat. 313,)

WEBB-KENYON ACT
27 U. S. C. A. § 122

§ 122. Shipments into states for possession or sale in violation of state law. The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited. (Mar. 1, 1913, c. 90, 37 Stat. 699; Aug. 27, 1935, c. 740, § 202(b), 49 Stat. 877.)

[The language of this section was reenacted without change by Act Aug. 27, 1935, c. 740, § 202(b), 49 Stat. 377.]

NEW YORK ALCOHOLIC BEVERAGE CONTROL LAW

§ 3. Definitions

Whenever used in this chapter, unless the context requires otherwise:

* * *

25. "Retail sale" or "sale at retail" means a sale to a consumer or to any person for any purpose other than for resale.

* * *

28. "Sale" means any transfer, exchange or barter in any manner or by any means whatsoever for a consideration, and includes and means all sales made by any person, whether principal, proprietor, agent, servant or employee of any alcoholic beverage and/or a warehouse receipt pertaining thereto. "To sell" includes to solicit or receive an order for, to keep or expose for sale, and to keep with intent to sell and shall include the delivery of any alcoholic beverage in the state.

* * *

34. "Wholesale sale" or "sale at wholesale" means a sale to any person for purposes of resale.

* * *

§ 99-a. Brand label use permit

1. (a) no manufacturer or wholesaler of liquor, wine or beer shall sell or solicit any order for any liquor, wine or beer in the state, the container of which bears a label stating the brand or trade name of the owner or producer, unless each brand label shall first have been registered with and approved by the authority pursuant to the provisions

of section one hundred seven-a of this chapter and a brand label use permit has been issued by the authority in accordance with the provisions of this section.

(b) The application for such permit shall be made in writing and shall contain such information as the liquor authority may require and, unless otherwise permitted or required by the authority, such application shall be filed by the same licensee registering the brand label pursuant to section one hundred seven-a of this chapter.

2. (a) Each brand label use permit issued pursuant to this section shall be valid for a term which shall run concurrently with the term of the brand label registration and shall not be transferrable.

(b) Each such permit shall set forth the exact brand or trade name of the alcoholic beverage for which the permit is issued, a description of the alcoholic beverage, the type or percentage of alcoholic content where applicable, the age or proof thereof where applicable, the age, type and percentage of base whiskey where applicable and such other information as to quality and identity as the authority may require and shall in form and in substance authorize the sale of and the soliciting of orders for the alcoholic beverage identified in such permit to wholesalers and retailers in this state.

3. (a) For the exercise of the privilege granted by any brand label use permit issued pursuant to this section, each manufacturer or wholesaler who is the holder of such a permit shall pay to the authority a fee, based upon the gallons of liquor, wine or beer sold in the state under such brand or trade name, the amount of which shall be determined in accordance with the following table:

Beer ..... one and one-ninth cents per gallon

Artificially carbonated sparkling wine except sparkling cider containing more than three and two-tenths per centum alcohol .. six and two-thirds cents per gallon

Natural sparkling wine except natural sparkling cider containing more than three and two-tenths per centum alcohol ..... thirteen and one-third cents per gallon

Liquor containing not more than twenty-four per centum alcohol ..... sixteen and two-thirds cents per gallon

All other liquor ..... seventy-five cents per gallon

For the purpose of this section, the term "gallon" shall mean one hundred twenty-eight fluid ounces.

(b) Each manufacturer or wholesaler to whom a brand label use permit has been issued pursuant to this section for a particular brand of liquor, beer or wine shall be presumed liable for the payment of such fees for all sales of such liquor, beer or wine.

(c) Such presumption of liability may be rebutted by such manufacturer or wholesaler upon a showing that: such fees have been paid by another manufacturer or wholesaler; another manufacturer or wholesaler was the con-

signee of such alcoholic beverages at the time of their original importation into the state and that he has assumed liability for the payment of such fees; another manufacturer or wholesaler caused such alcoholic beverages, whether or not represented by warehouse receipts, to be removed from a warehouse and is liable or has assumed liability for the payment of such fees; another licensee or permittee has used such alcoholic beverages in the processes of manufacture and is liable or has assumed liability for the payment of such fees.

(d) The above fees shall not be applicable where alcoholic beverages are sold to the United States or under any other circumstances where the sale of such alcoholic beverages would be exempt from excise taxes under the provisions of article eighteen of the tax law.

4. (a) The fees prescribed in subdivision three shall become due and payable on the twenty-fifth day of the month following the month in which such alcoholic beverages are sold or used, unless the authority shall shorten or extend the time within which such payment shall be made, and shall be accompanied by a schedule stating separately the number of gallons of liquor, wine and beer sold by each manufacturer or wholesaler in the state during the preceding calendar month and such other information as the authority may require.

(b) Nothing contained in this section shall prohibit the sale by any manufacturer or wholesaler to any retailer of any alcoholic beverage to be resold by such retailer under a brand label registered by such retailer under section one hundred seven-a of this chapter; provided that such manufacturer or wholesaler shall pay to the authority the appropriate fee prescribed in subdivision three of this section.

5. Whenever any manufacturer or wholesaler shall fail to pay any fees prescribed by this section within the time provided by this section, the authority may suspend, cancel or revoke the license of such manufacturer or wholesaler if any such payments have not been made after written notification of at least fifteen days following the date such payment became due. Such written notification shall in any event direct the manufacturer or wholesaler to file promptly the schedule of sales required by subdivision four of this section, and failure to comply with such direction within ten days shall be grounds for suspension, cancellation or revocation of the license of such manufacturer or wholesaler.

The attorney general shall, upon request of the authority, enforce payment of such fees by civil action in the supreme court, in the name of the people of the state, against such manufacturer or wholesaler for the amount of such fees, with interest. The proceeds of the judgment, if any, entered upon such action shall be paid to the department of audit and control.

6. Whenever the authority shall determine that any moneys received under the provisions of this section were paid in error or in connection with sales made for non-beverage or sacramental purposes, it may cause the same to be refunded, without interest, in accordance with such rules and regulations as it may prescribe. A licensee entitled to a refund under the provisions of this subdivision may be granted a credit therefor to be applied to future payments that may be required under this section. Credits may also be granted and similarly applied where the authority determines that, due to breakage, alcoholic beverages have not been sold or used by a licensee.

7. The authority is hereby authorized to promulgate rules which are necessary: (a) to carry out the provisions and effectuate the purposes of this section and to prevent circumvention or avoidance thereof; (b) when not inconsistent with the purposes of this section and whenever necessary to avoid practical difficulties or unnecessary hardship to any licensee affected by this section, to exempt from the fee provisions of subdivision three of this section, for good cause shown, transfers, exchanges, returns and other adjustments between one licensee and another, subject to such terms and conditions as it deems necessary.

8. Notwithstanding the provisions of section four hundred thirty-seven of the tax law, the state tax commission is hereby authorized to furnish to the authority such information as the authority may require relative to tax returns filed by a licensee pursuant to the provisions of article eighteen of the tax law.

§ 101-bb. Prohibition against retail sales at less than cost

1. It is the declared policy of the state that it is necessary to regulate and control the manufacture, sale and distribution within the state of liquor for the purpose of fostering and promoting temperance in its consumption and respect for and obedience to the law. In order to eliminate retail sales of liquor at less than cost which unduly disrupt the orderly sale and distribution of liquor, it is hereby declared as the policy of the state that the sale of liquor should be subjected to certain restrictions, prohibitions and regulations. The necessity for the enactment of the provisions of this section is, therefore, declared as a matter of legislative determination.

2. No licensee authorized to sell liquor at retail for off-premises consumption shall sell, offer to sell, solicit an

order for or advertise any item of liquor at a price which is less than cost. As used in this section, the term:

(a) "liquor" shall mean liquor bearing a brand or trade name, and of like age and quality, which is contained in a schedule filed with the authority pursuant to section one hundred one-b of this article, and

(b) "cost" shall mean the price of such item of liquor to retailers contained in the applicable schedule filed with the authority pursuant to section one hundred one-b of this article and which is in effect at the time such licensee sells, offers to sell, solicits an order for or advertises such liquor at retail. As used in this paragraph (b), the term "price" shall mean bottle price, before any discounts, contained in such schedule.

3. Nothing contained in this section, however, shall prevent such licensee from selling, offering to sell or soliciting an order for such liquor at a price less than cost, provided that prior written permission therefor is granted by the authority for good cause shown and for reasons not inconsistent with the purpose of this chapter and under such terms and conditions as the authority deems necessary.

4. The authority is hereby authorized to promulgate rules which are necessary

(a) to carry out the purpose of this section and to prevent its circumvention;

(b) to permit the sale of liquor which is damaged or deteriorated in quality, or the close-out of a brand for the purpose of discontinuing its sale, at a price which is less than cost and under such terms and conditions as are necessary to carry out the purposes of this section;

(c) to permit the sale whenever necessary to avoid practical difficulties or unnecessary hardships to any licensee

affected by this section or because of acts or circumstances beyond the control of such licensee, at a price which is less than cost and under such terms and conditions as are necessary to carry out the purposes of this section.

* * *

NEW YORK TAX LAW § 432.

Tax to be paid but once; foreign and interstate commerce; injunction.

Nothing in this article shall be construed to require the payment to the department of taxation and finance of the taxes imposed by this article more than once on any quantity of alcoholic beverages sold or used within this state. No provision of this article shall apply or be construed to apply to foreign or interstate commerce, except in so far as the same may be effective pursuant to the United States constitution and to the laws of the United States enacted pursuant thereto. The supreme court shall have jurisdiction to restrain the department, by injunction, from collecting a tax under this article upon any sale as to which, by reason of the United States constitution and the laws of the United States enacted pursuant thereto, such a tax cannot be imposed.

RULES OF THE [NEW YORK] STATE LIQUOR AUTHORITY
Rule 16 (9 NYCRR 65.4[a])

65.4 Prices to retailers

(a) The price to retailers, except retailers operating railroad cars, shall include federal customs duties, internal revenue taxes, State taxes and fees and cost of delivery to the retailer. * * *

APPENDIX B

COURT OF APPEALS
OF THE
STATE OF NEW YORK

—o—

In the Matter
of
THE HOUSE OF SEAGRAM, INC. & ors.,
Appellants,

against

STATE LIQUOR AUTHORITY & ARTHUR LEVITT,
Comptroller of the State of New York,
Respondents.

—o—

Decided July 2, 1969
Reported 25 N Y 2d 865

Order affirmed, with costs, on the opinion at the Appellate Division. Concur: FULD, Ch. J., BURKE, SCILEPPI, BERGAN, BREITEL and JASEN, JJ.

APPENDIX C

Opinion of New York Supreme Court

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT

—o—

In the Matter
of
THE HOUSE OF SEAGRAM, INC. *et al.*,
Appellants,
against
STATE LIQUOR AUTHORITY & ARTHUR LEVITT,
Comptroller of the State of New York,
Respondents.

—o—

Decided July 22, 1968
Reported 30 A D 2d 380

APPEAL from a judgment of the Supreme Court at Special Term (SYDNEY F. FOSTER, J.), entered June 21, 1966 in Albany County, which dismissed petitioners' applications in a proceeding under CPLR article 78 to direct the refund of certain fees and to direct the respondents to desist from further collecting such fees.

HERLIHY, J. The petitioner has alleged that it is a wholesaler of certain alcoholic beverages imported by it from foreign countries and resold by it in "the package of original importation".

Section 99-a of the Alcoholic Beverage Control Law requires the petitioner to secure a brand label use permit for the subject imported goods prior to their sale or the

solicitation of any orders therefor in this State and further imposes a fee for the said permit based upon sales in this State. The said section 99-a also provides that the subject fees are not applicable if the sales would be exempt from excise taxes pursuant to article 18 of the Tax Law.

Section 424 of the Tax Law imposes an excise tax on liquor except where the State is without power to impose such a tax.

The narrow issue presented to this court is whether or not an excise tax may be imposed by New York State on the *first sale* of alcoholic beverages in their original package in New York State by an importer-wholesaler.

The parties agree that the applicable portion of the United States Constitution is section 10 of article 1 thereof, commonly known as the Import-Export Clause which prohibits State taxation of imports or exports without the consent of Congress. (See *Department of Revenue* v. *James Beam Co.*, 377 U. S. 341, 344.)

The power of a State to tax chattels imported from foreign countries depends upon whether or not the process of importing has ended prior to the imposition of the tax. (See *Department of Revenue* v. *James Beam Co., supra*, p. 346.) In *Brown* v. *Maryland* (12 Wheat. [25 U. S.] 419) the court held that a tax on the importer for the privilege of selling an article, imported only for sale, was prohibited by the Import-Export Clause. The prohibition against such a tax, however, was limited to levies prior to the incorporation of the goods into the common mass of goods in the State. In the *Brown* case, the statute involved required importers, as a specific class, to obtain a license and pay a fee for the same prior to selling the imported products. In the present case, the subject fee is applied to all wholesalers who sell the subject alcoholic beverages in this State.

In *Hooven & Allison Co.* v. *Evatt* (324 U. S. 652, 656) the court reiterated the rule of the *Brown* case.

As a general proposition the rule appears to be that goods imported for resale in their original package may not be taxed by a levy on the importer, which levy is related to the sale of the goods. The prohibition against such levies appears to be limited to transactions prior to the goods having reached the market place or point where they are held for sales to consumers.

However, the present case concerns a particular class of goods, to wit: alcoholic beverages.

In 1919 the Eighteenth Amendment to the United States Constitution was duly ratified by the States. This amendment prohibited "the manufacture, sale, or transportation of intoxicating liquors within, the *importation* thereof into, or the *exportation* thereof from the United States * * * for beverage purposes." (Emphasis added.) In 1933 the Twenty-first Amendment to the United States Constitution was duly ratified by the States. This amendment repealed the Eighteenth Amendment and provided in section 2 thereof: "The transportation or *importation* into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." (Emphasis added.)

The most recent decision of the Supreme Court relating directly to the Import-Export Clause and the Twenty-first Amendment is *Department of Revenue* v. *James Beam Co.* (*supra*). Beam was the sole distributor in the United States of a particular brand of liquor produced in Scotland, shipped via the ports of Chicago or New York to Beam's warehouses in Kentucky and subsequently sold to customers in domestic markets throughout the United States. The

applicable Kentucky statute provided: "No person shall ship or transport or cause to be shipped or transported into the state any distilled spirits from points without the state without first obtaining a permit from the department and paying a tax of ten cents on each proof gallon contained in the shipment." (Ky. Rev. Stat., § 243.680, subd. [2], par. [a].) The Kentucky Court of Appeals held that the tax in question, although an occupational or license tax in form, was a tax on imports, noting that the incidence of the tax is the act of transporting or shipping the distilled spirits into the State. The Supreme Court affirmed the Kentucky court and held that the tax was one on imports and thus in violation of the Import Clause; and that the Twenty-first Amendment did not permit the State to lay an impost on imported liquor. (It might be noted that an *impost* is a generic term for tax; and an excise tax has been defined to mean a type of impost [see Black's Law Dictionary (4th ed.), pp. 672, 889].) In *Beam* the tax was on the act of shipping or transporting the liquor into the State; in the present case we are considering a tax on the sale of liquor which is an excise tax levied when the liquor is *sold* within this State by an importer.

The court in *Beam* referred to the case of *DeBary* v. *Louisiana* (227 U. S. 108) as follows: "The Court upheld under the Wilson Act a Louisiana license tax imposed on the business of *selling* in their original packages wines and liquors imported from abroad. There is nothing in that decision * * * to support the view that Congress intended * * * to consent to state taxation upon importation of liquor." (Emphasis in original.) (*Department of Revenue* v. *James Beam Co.*, *supra*, pp. 345-346, n. 7.) The emphasis of the court on the aspect of selling as opposed to the act of importation (transportation) cannot be ignored and we find in *Beam* an implicit approval of taxation on the *sale* of

alcoholic beverages in the original package or otherwise. More support for the theory that there presently is a distinction between a tax on the sale of the subject beverages and a tax on the importation of the goods is found in *Gordon* v. *Texas* (166 Tex. Cr. Rep. 24, affd. 335 U. S. 369). As noted in *Beam*, the tax in the *Gordon* case was held not to be a tax on imports. (See *Department of Revenue* v. *James Beam Co.*, *supra*, p. 345, n. 6.)

In view of the holdings in *Gordon* and *DeBary* and the language in *Beam*, we conclude that by virtue of the Twenty-first Amendment an unusual and exceptional power was given to the States to control alcoholic beverages within its borders and, therefore, the Import-Export Clause is not violated when New York imposes an excise tax on the sale of liquor in its "original package" within the State of New York, regardless of its ultimate destination.

In any event, the present case presents no facts which would indicate that the liquor involved was destined for distribution outside New York. The relief requested by the petitioner herein concerns specific sales of liquor and the fees already paid in connection therewith, and from what would appear in the parties' briefs, it is conceded that this case involves liquor that has come to rest in New York. Moreover, the petitioner seems to concede that the fact that the goods are sold in their "original package" does not necessarily mean that they are still in the process of importation.

If, as would appear, the action deals with alcoholic beverages that have come to rest in New York, then clearly the present excise tax is constitutional; for as it was pointed out in *Brown*, the purpose of the Import Clause was to prevent the seaport States from taking an unfair tax ad-

vantage of the inland States.[1] (See *Brown* v. *Maryland*, *supra*, p. 440.) The court went on to note that "When we are inquiring, whether a particular act is within this prohibition, the question is not, whether the state may so legislate as to so hurt itself, but whether the act is within the words and mischief of the prohibitory clause." (*Ibid.*)

Subsequent cases make clear that the "mischief" to be prevented by the Import Clause was the ability of the importing States to levy a tax on products which were destined for use or resale in the inland States. (*Youngstown Co.* v. *Bowers*, 358 U. S. 534, 545; *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 656, *supra*; *Woodruff* v. *Parham*, 8 Wall. [75 U. S.] 123, 134-135; License Cases, 5 How. [46 U. S.] 504, 575-576.) Based on the aforementioned decisions, we would conclude that an excise tax on liquor that comes to rest in New York and is resold for use in New York State does not violate the Import Clause for the tax is simply not within the purpose of the constitutional prohibition.

Furthermore, the court in *Beam* (p. 346) stated: "There can surely be no doubt, either, of [a State's] plenary power to regulate and control, *by taxation* or otherwise, the distribution, use, or consumption of intoxicants within her territory after they have been imported." (Emphasis added.) In the present case, the petitioner has failed to allege that the liquor was at the time of sale in transit and accordingly the excise tax that could be imposed on the liquor involved would be a tax "after [the liquor has] been imported".

In sum; it is determined that New York State may constitutionally tax the sale of alcoholic beverages in their

[1] We might note that the necessity for the existence of the import clause seems to have abated in modern times inasmuch as all the States can easily become import States as to goods capable of air transportation and to inland seaports by boat.

"original package" by an importer when the sale is made in the State. It is further determined that the State may in any event impose a tax in like circumstances when the liquor is destined for use and distribution within the State, and that petitioner has failed to allege that the sales in question were otherwise. Thus the present sales are not exempt from the fee levied under section 99-a and, of course, from the foregoing discussion, the fee does not violate the Import Clause of the Constitution of the United States.

The judgment should be affirmed.

Gibson, P. J., Aulisi, Staley, Jr., and Gabrielli, JJ., concur.

Judgment affirmed, with costs.

APPENDIX D

Opinion of Judge Foster

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

In the Matter
of
THE HOUSE OF SEAGRAM, INC.,
Petitioner,
against
STATE LIQUOR AUTHORITY, etc.,
Respondents.

(And Other Proceedings.)

Decided June 2, 1966.
Reported 51 Misc. 2d 157.

SYDNEY F. FOSTER, J. These proceedings, brought by several petitioners under article 78 of the CPLR, involve substantially the same issue or issues. For the purposes of this memorandum, and for the sake of convenience, the singular term petitioner will hereinafter be used. The respondents, State Liquor Authority and the State Comptroller, have moved to dismiss the petition herein.

Petitioner is duly licensed to sell liquor and wine at wholesale pursuant to the provisions of the Alcoholic Beverage Control Law (hereinafter referred to as the A. B. C.

Law). Respondent, State Liquor Authority (hereinafter referred to as SLA), has collected a fee from petitioner for the issuance of a brand label use permit in connection with the sale of liquor and pursuant to the provisions of section 99-a of the A. B. C. Law (as added by L. 1963, ch. 204, § 32). Paragraph (a) of subdivision 1 of said section 99-a provides: "no manufacturer or wholesaler of liquor, wine or beer shall sell or solicit any order for any liquor, wine or beer in the state, the container of which bears a label stating the brand or trade name of the owner or producer, unless each brand label shall first have been registered with and approved by the authority pursuant to the provisions of section one hundred seven-a of this chapter and a brand label use permit has been issued by the authority in accordance with the provisions of this section.".

The fee part of the statute, paragraph (a) of subdivision 3, reads in part as follows: "For the exercise of the privilege granted by any brand label use permit issued pursuant to this section, each manufacturer or wholesaler who is the holder of such a permit shall pay to the authority a fee, based upon the gallons of liquor, wine or beer sold in the state under such brand or trade name".

Paragraph (d) of subdivision 3 of the statute provides: "The above fees shall not be applicable where alcoholic beverages are sold to the United States or under any other circumstances where the sale of such alcoholic beverages would be exempt from excise taxes under the provisions of article eighteen of the tax law."

Section 432 of article 18 of the Tax Law, insofar as pertinent here, simply provides that no provision of such article (taxes on liquor sold or used within this State) shall apply or be construed to apply to foreign or interstate commerce.

It is the contention of petitioner that the fees prescribed by section 99-a of the A. B. C. Law for the issuance of a brand label use permit are inapplicable to the sale of liquor imported by petitioner and sold by it in the packages of original importation; and that if the section does require the payment of fees, it is unconstitutional as an import duty and in violation of section 10 of article I of the United States Constitution. On the basis of the foregoing, petitioner filed with the respondent SLA claims for refunds of payments made during various periods on sales of imported alcoholic beverages sold in the package of original importation. Such claims were rejected, and hence this proceeding in which, among other forms of relief, petitioner seeks an order of refund. There are no disputed issues of fact, since the respondents by their motion to dismiss concede the facts set forth in the petition, but this of course does not include conclusions or matters of law.

The contention of petitioner that section 99-a does not apply to its sales of brand liquor in packages of original importation necessarily depends upon whether the fees prescribed by the statute are found to be import duties, for the prohibition contained in section 432 of the Tax Law as evidenced by its language extends only to foreign or interstate commerce, and in turn whether the exemption in section 99-a (subd. 3, par. [d]) of the A. B. C. Law extends only to excise taxes prohibited under section 432 of the Tax Law. Hence the only real issue is whether the fees charged petitioner for the exercise of the privilege granted by a brand label use permit are in violation of the United States Constitution (art. I, § 10, cl. 2) which provides: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws".

The original package doctrine as related to imports was first enunciated by the Supreme Court in the case of *Brown v. Maryland* (12 Wheat. [25 U. S.] 419). There the court declared unconstitutional a license charge levied against importers by the State of Maryland. The court said among other things (p. 442): "but, while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition in the constitution." This was in 1827. The effect of this decision was modified in 1890 when Congress passed the so-called Wilson Act or Original Packages Act (U. S. Code, tit. 27, § 121; 26 U. S. Stat. 313). The title to this Act was "An Act to limit the effect of the regulations of commerce between the several States and with foreign countries in certain cases", and it provided: "§ 121. State statutes as operative on termination of transportation; original packages. All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors have been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

Patently, under the language of the foregoing act, so far as liquor is concerned, the import process ceased upon the arrival of liquor in a State and subjected the same to State regulation whether or not such liquor was still in the origi

nal package of importation. Such was the view of the Supreme Court in 1913 (*DeBary* v. *Louisiana*, 227 U. S. 108; see, also, *Department of Revenue* v. *James Beam Co.*, 377 U. S. 341). Subsequently of course came the Eighteenth Amendment to the Constitution of the United States (in effect Jan. 16, 1920) which prohibited the manufacture, sale or transportation of intoxicating liquors in this country. Thereafter the Eighteenth Amendment was repealed by the Twenty-first Amendment to the Federal Constitution (in effect Dec. 5, 1933). Of course during the tenure of the Eighteenth Amendment the Wilson Act became a dead letter for there was nothing for the States to regulate, but the act was never repealed. The Twenty-first Amendment gave recognition to the States' power to control the transportation or importation of intoxicating liquors into any State, but it did not affect in any way so far as can be seen the operation of the Wilson Act. There is authority to the effect that such act is still in effect (*Hostetter* v. *Idlewild Liq. Corp.*, 377 U. S. 324, 333, n. 11; *Department of Revenue* v. *James Beam Co.*, 377 U. S. 341, 345-346, n. 7, *supra*).

Aside from all this the language of section 99-a clearly indicates that the brand label use fee is not a tax on imports but rather a charge for the privilege of selling a particular brand of liquor in this State. It applies to all brand label sales where a permit is granted regardless of whether the liquor was manufactured in the State, shipped in from other States or imported from a foreign country. Measurement of the privilege fee by the volume of brand label liquors sold is a valid exercise of regulatory power by the State, for the fee is not imposed on liquor as such but for the privilege of using a brand name (see *Educational Films Corp.* v. *Ward*, 282 U. S. 379; *Canton R. R. Co.* v. *Rogan*, 340 U. S. 511).

The conclusion is reached that the challenged fee is not an import duty on imported goods; and such fee does not contravene section 432 of the Tax Law.

Petition dismissed without costs.

In the proceedings brought by the Cardinal Distributors Inc., and Universal Liquor Corporation, the petitions are also dismissed without costs for the reasons stated in the foregoing memorandum. It is unnecessary to reach the issue of petitioners' status.

The petition in the proceeding brought by Knickerbocker Liquors Corporation is also dismissed without costs.